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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALLEN PATRICK FLUG, Defendant and Appellant.	E056238 (Super.Ct.No. FMB1000471) OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Sachi Wilson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Allen Patrick Flug pled no contest to lewd act on a child under 14 years of age (Pen. Code, § 288, subd. (a), count

5);[1] continuous sexual abuse of a child (§ 288.5, subd. (a), count 6); sodomy (§ 286, subd. (c)(1), count 7); lewd acts with a child (§ 288, subd. (a), counts 8, 9, & 10); and annoying or molesting a child (§ 647.6, subd. (b), count 11). In return, the remaining allegations were dismissed and defendant was sentenced to a total term of 26 years eight months in state prison with credit for time served. Defendant's sole contention on appeal is that the trial court erred in denying his motion to withdraw his guilty plea. We reject this contention and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

Defendant repeatedly molested his former roommate's four-year-old son John Doe. The molestations were discovered in November 2010 when John bent over while taking a bath with two other boys, ages two and four, and told one of the young boys to "[p]ut your pee-pee in my butt." When the roommate asked John about his behavior, he told him that defendant had been touching his penis and licking his buttocks. John reported the same allegations to a responding sheriff's deputy.

A few days later, a detective went to defendant's home to speak with defendant regarding the allegations. When the detective asked defendant if he knew why he was there, defendant responded it was because of "what happened" with John, and invited the detective inside. The detective asked defendant if he would be willing to go to the police

[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the preliminary hearing transcript.

station for an interview and take a polygraph test. Defendant responded that he understood what a polygraph test was and agreed to go to the police station with the detective and take the test.

At the police station, an examiner administered the polygraph test.[3] After the test, the detective went into the examination room and asked defendant some questions. Defendant stated that he would babysit John when John's father was working and admitted to molesting the child on two occasions. Defendant explained that on one occasion he took off John's clothing, licked his buttocks, inserted his penis into John's anus, and sodomized him for two minutes until he ejaculated into John's anus. He then inserted his penis into John's mouth. Defendant also stated that on another occasion he was watching pornography and masturbating in a bedroom when John walked in. He then made John touch his penis and after taking off both of their clothing, defendant inserted his penis into John's anus and had anal sex with him until he ejaculated.

On February 22, 2011, a five-count information was filed charging defendant with two counts of sexual intercourse or sodomy with a child 10 years or younger (§ 288.7, subd. (a), counts 1 & 3); two counts of oral copulation or sexual penetration with a child under 10 years old (§ 288.7, subd. (b), count 2 & 4); and one count of committing a lewd act on a child under 14 years old (§ 288, subd. (a), count 5).

[3] The results of the test were inconclusive due to defendant's actions during the examination.

On August 8, 2011, defendant filed a motion to suppress his admissions pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Following a hearing, the trial court denied that motion.

On August 10, 2011, defendant pled no contest to the new charges of continuous sexual abuse of a child (§ 288.5, subd. (a), count 6); sodomy (§ 286, subd. (c)(1), count 7); lewd acts with a child (§ 288, subd. (a), counts 8, 9, & 10); and annoying or molesting a child (§ 647.6, subd. (b), count 11), as well as to count 5. In return, defendant was given an indicated sentence of 26 years eight months in state prison.

At the time of the taking of his plea, the court reviewed the plea form with defendant and asked defendant whether he had placed his initials on the plea form, signed the plea form, understood the plea, and discussed the plea with his attorney. Defendant replied in the affirmative. Defendant also noted that he understood everything on the form, including his constitutional rights, and the consequences of pleading guilty, the charges, and the penalties. He further stated that he was willing to waive his rights and plead no contest; that no one had made any promises of a lesser sentence or used threats or violence to force him to plead guilty; and that he was not under the influence of any substance affecting his ability to understand the proceedings. Defendant also answered in the affirmative of whether he had sufficient time to discuss his case with his attorney, including all his rights, potential defenses, penalties, punishments, and future consequences; and whether he understood all of those rights, penalties, punishments, and consequences. Defense counsel also answered in the affirmative of whether he had adequate time to discuss all the issues with defendant, whether he had gone over the plea

form with defendant, and whether he was satisfied defendant understood everything on the plea form. After directly examining defendant, the court found that defendant intelligently and voluntarily waived his constitutional rights and that his plea was free and voluntary.

Prior to sentencing on September 22, 2011, defendant's counsel requested a continuance to investigate whether to file a motion to withdraw defendant's plea based on information that defendant had been in a special education program at school.

On March 7, 2012, about seven months after pleading no contest, defendant filed a motion to withdraw his guilty plea based on new facts that defendant's school records indicated defendant had been in a special education program and that defendant had shown autistic behaviors and had speech and language issues. Defendant argued that this new information was relevant to the question of whether his admissions were voluntary. On this same day, and based on the same information, defendant also filed a motion for a new trial.[4]

The hearing on the motion to withdraw defendant's plea was held on March 22, 2012. Following argument from counsel, the trial court denied the motions to withdraw defendant's plea. The court found that defendant had not established good cause to withdraw his plea by clear and convincing evidence, because there was no evidence to suggest that defendant was operating under mistake, ignorance, inadvertence, or that the exercise of his free judgment was overcome due to a mental impairment. The court

[4] The trial court characterized this motion as "supplemental documents to support the motion" to withdraw the plea, since there was no trial in this case.

explained: "Counsel has merely suggested that the defendant was in special education high school. He provided photocopies of documents from the Morongo Unified School District that indicated defendant had . . . 'Emotional disturbance' . . . [¶] The box for . . . 'Autistic-like behaviors' . . . was checked but then crossed out with what appears to be initials next to the crossing out. [¶] The same occurred for the box for . . . 'Speech/language impairment' . . . It too was checked but then crossed out with the initials next to the cross-out. [¶] Additionally, these alleged and unsupported . . . 'findings' were listed as . . . 'secondary disability,' not . . . 'primary disability.' " The court further pointed out that defendant's school psychologist reported that "[i]ntellectually, his verbal comprehension, perceptual organization, and overall cognitive abilities were average." The court also noted that the school documents did not show defendant demonstrated a "difficulty understanding or using spoken language to such an extent that it adversely affects his educational performance."

In conclusion, the court did not find any competent evidence to suggest defendant suffered from mental impairments that affected his ability to knowingly and intelligently waive his constitutional rights and enter a no contest plea, noting that neither defendant nor his counsel had asserted defendant lacked competence to plead guilty and that having observed defendant during the taking of the plea it was clear to the court that defendant's plea was entered into freely, voluntarily, knowingly, and intelligently. The court further found that defendant failed to present sufficient evidence to "the issue of defendant's competence to either waive his *Miranda* rights at the time he was interviewed by law enforcement or to waive his constitutional rights and plead no contest."

Defendant was subsequently sentenced to 26 years eight months in state prison with credit for time served. This appeal followed.

II

DISCUSSION

Defendant contends that the trial court erred in denying his motion to withdraw his plea based entirely on the premise that the court erroneously denied his suppression motion due to a mental impairment.

Section 1018 provides that a trial court may, upon a showing of good cause, allow a defendant to withdraw a plea of guilty (*People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 796), or no contest (e.g., *People v. Brown* (1986) 179 Cal.App.3d 207, 213). Section 1018 must be liberally construed to promote justice. (§ 1018.) Mistake, ignorance, and other factors overcoming the defendant's free will, such as inadvertence, fraud, or duress, constitute good cause to justify withdrawal of a guilty plea. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) The defendant must establish good cause by clear and convincing evidence. (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) For a plea to be valid, the defendant must have waived his or her rights voluntarily, knowingly, and intelligently. (*Brady v. United States* (1970) 397 U.S. 742, 748.) Although section 1018 must be liberally construed; "[a] plea may not be withdrawn simply because the defendant has changed his [or her] mind." (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

When a defendant is represented by counsel, the denial of a motion to withdraw a plea is left to the sound discretion of the trial court. (*People v. Shaw* (1998) 64

Cal.App.4th 492, 495-496.) "A denial of the motion will not be disturbed on appeal absent a showing the court has abused its discretion. [Citation.]." (*People v. Nance*, *supra*, 1 Cal.App.4th at p. 1456.) To reflect such abuse, the trial court's decision must have been "arbitrary, capricious or patently absurd." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Defendant has failed to establish good cause to withdraw his plea of no contest. The record does not show mistake, ignorance, fraud, duress, or any other factor overcoming the exercise of his free will. There was no showing defendant was sufficiently mentally impaired to justify withdraw of his plea. In fact, the evidence adduced at the hearing showed that defendant's intelligence and cognitive ability was that of an average person. No evidence was presented of a clinically diagnosed mental condition that would have precluded defendant from intelligently, knowingly, and voluntarily entering his plea. The trial court, which was in the best position to judge defendant's mental state and demeanor, found no impairment. To the contrary, the court noted that it had observed defendant throughout the plea hearing and found that defendant appeared to understand all of the court's questions and advisements.

Furthermore, the transcript of the plea proceeding shows defendant answered in the affirmative when asked whether he understood he was waiving his constitutional rights and whether he understood the charges and consequences of his no contest plea. Defendant also answered in the affirmative when asked whether he had sufficient time to discuss his case with his attorney, including all his rights, potential defenses, penalties, punishments, and future consequences; and whether he understood all of those rights,

penalties, punishments, and consequences. Indeed, at the time of his motion to withdraw his guilty plea and, on appeal, defendant makes no argument that at the time he entered his plea he acted under mistake, confusion, or any other condition that affected his ability to understand his plea.

Although defendant frames his argument on appeal as challenging the trial court's denial of his motion to withdraw his plea, defendant is actually attacking the trial court's denial of his motion to suppress his confession. Defendant's claim, however, is foreclosed by our Supreme Court's decision in *People v. DeVaughn* (1977) 18 Cal.3d 889 (*DeVaughn*). A guilty plea admits all matters essential to the conviction. (*Id*. at p. 895.) "Issues cognizable on an appeal following a guilty plea are limited to issues based on 'reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings' resulting in the plea. [Citations.]" (*Id*. at pp. 895-896; see also *People v. Hoffard* (1995) 10 Cal.4th 1170, 1178 [review after a guilty plea is "limited to issues going to the jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea"].) A plea of nolo contendere has the same legal effect as a guilty plea. (§ 1016.)

The California Supreme Court has held that a defendant's guilty plea forecloses an appeal of the conviction on the basis that a statement was involuntary. "Given the accused's guilty plea, an extrajudicial statement relating to his guilt of a charged crime does not, by reason of a claim that it was involuntarily or improperly induced, raise an issue on appeal based on 'constitutional, jurisdictional or other grounds going to the legality of the proceedings' resulting in the plea." (*DeVaughn, supra,* 18 Cal.3d at

p. 896.) Defendant's claim of an involuntary statement taken in violation of *Miranda*, *supra*, 384 U.S. 436 is therefore not reviewable on appeal.

In short, the record reflects defendant's awareness and understanding of his rights and the consequences of his actions. Defendant has thus failed to establish that his mental state precluded him from entering a valid plea. The trial court did not abuse its discretion in denying defendant's motion to withdraw his plea.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.